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In The

Supreme Court of the United States

October Term, 1970

UNITED TRANSPORTATION UNION,
LOCAL LODGE #21,

Petitioner,

vs.

ST. PAUL UNION DEPOT, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, United Transportation Union, Local Lodge #21, prays that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered in these proceedings on November 12, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, as yet unreported, appears at Appendix A, *infra*, page 15. The opinion of the United States District Court for the District of Minnesota, as yet unreported, appears at Appendix B, *infra*, page 21.

JURISDICTION

The Order of the United States Court of Appeals for the Eighth Circuit affirming the Order for Judgment of the lower court was issued on November 13, 1970. This Petition for a Writ of Certiorari to the Court of Appeals was timely filed.

This is a civil action originally brought by petitioner in the United States District Court for the District of Minnesota. The petitioner and respondent are subject to the Railway Labor Act, 45 U.S.C. Section 151, et seq. The petitioner and respondent exchanged Section 6 notices to negotiate on the right of respondent to establish and abolish job assignments. These notices were outstanding, and one was subjected to the jurisdiction of the National Mediation Board, on April 9, 1970, when respondent announced the abolishment of three switchtender job assignments at the union depot yard in St. Paul, Minnesota. Petitioner immediately sought injunctive action by temporary restraining order, and the trial court entered that. Upon the hearing for a permanent injunction, the trial court entered judgment for respondent and denied petitioner's injunctive relief.

The judgment sought to be reviewed on a ruling of the Court of Appeals for the Eight Circuit in affirming the trial court's entry of judgment for respondent and denying petitioner's injunctive relief. The Court of Appeals issued its order on November 12, 1970.

Jurisdiction of the Court for this petition is conferred on this Court by Title 28, United States Code, Section 1254(1).

This Court's opinion sustaining the jurisdiction of this Court is:

Detroit and Toledo Shoreline Railroad v. United Transportation Union, 396 U.S. 142 (1969).

The applicability of Section 6 of the Railway Labor Act, 45 U.S.C. Section 156, is here involved.

There is a real and substantial controversy presented in this petition, inasmuch as the opinions of the United States District Court and the United States Court of Appeals are in clear contradiction of the ruling of this Court in *Detroit and Toledo Shoreline Railroad v. United Transportation Union*, supra.

QUESTIONS PRESENTED

Petitioner on January 9, 1970, served on the respondent a notice under Section 6 of the Railway Labor Act to negotiate the carrier's abolishment of job assignments. On January 19, 1970, respondent served on petitioner a similar Section 6 notice to negotiate on the limitation of the respondent's right to establish and abolish job assignments. Petitioner's Section 6 notice resulted in the jurisdiction of the National Mediation Board under the Railway Labor Act being established on March 20, 1970. The notice filed by respondent was submitted to national negotiations by respondent.

Respondent on April 8, 1970 announced the abolishment of three switchtender job assignments. At the time of the commencement of this injunctive action, the three switchtender jobs in question were in existence. The questions presented here relate to the right of the respondent under the Railway Labor Act to abolish job assignments which were subject to negotiation under the Railway Labor Act at the time of the attempted abolishment. These questions are:

1. Whether respondent was subject to the mandatory retention of the status quo of the switchtender job assignments in respondent's yard when it filed a Section 6 notice relating to abolishment or retention of job assignments on January 19, 1970, and whose conferences concerning the notice

were not completed or terminated at the time of the abolishment taken unilaterally by appellee on April 10, 1970.

2. Whether petitioner's Section 6 notice filed pursuant to the Railway Labor Act on January 9, 1970, where negotiations were terminated on January 19, 1970, and where appellant requested the services of the National Mediation Board on March 30, 1970, effected a mandatory retention of the *status quo* of the switchtender job assignments by respondent at the time of the unilateral termination of those assignments on April 10, 1970.

STATUTORY PROVISIONS INVOLVED

Title 45, Section 152 Second:

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Title 45, Section 152 Seventh:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title.

Title 45, Section 155 First:

> The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in con-

ference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

• • •

Title 45, Section 156:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended change shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

CONCISE STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted and may be introduced to the court in a summary fashion.

Petitioner is a union representing employees at the St. Paul Union Depot Company, St. Paul, Minnesota. The Company, respondent here, is a carrier subject to the provisions of the Railway Labor Act, 45 U.S.C. Section 151, *et seq.*

Pursuant to the Railway Labor Act, Petitioner on January 9, 1970 served on respondent a notice under Section 6, 45 U.S.C. Section 156, to negotiate on: "Our desire to

change, modify or supplement existing agreement or agreements to become effective 30 days from the date of this notice, to provide that the St. Paul Union Depot Company will not abolish, annul, or cancel any assignments or jobs without negotiation or agreement with the general committee of adjustment, United Transportation Union."

January 19, 1970, respondent served on the petitioner a Section 6 notice to negotiate on: "All agreements, rules, regulations, interpretations and practices which limit the right of the carrier to establish and abolish yard service and yard service assignments shall be eliminated." This notice is still pending. See #5 of the Findings of Fact in Appendix B, *infra*, page 23.

The notice filed by petitioner resulted in termination of negotiations on January 19, 1970, and appellant requested and obtained the services of the National Mediation Board pursuant to the Railway Labor Act on March 30, 1970. See Finding #5, Appendix B, *infra*, page 23. Respondent has not made any objection to assumption of jurisdiction by the National Mediation Board.

Respondent issued a bulletin on April 9, 1970 announcing that the three switchtender job assignments at Shanty #10, the jobs which are the subject of this litigation, would be abolished on the completion of the respective tours on April 10, 1970.

The three switchtender jobs in question were in existence at the time of the commencement of the injunctive action, this litigation, and at the time that the Section 6 notices were filed by appellant and appellee. See Finding #9(a), Appendix B, *infra*.

The trial court entered its findings, conclusions, and order for summary judgment on April 17, 1970. Appendix B, *infra*, page 21. The trial court in conclusion #5, Appendix

B, page 23, *infra*, held that the respondent "• • • has an existing, status quo right to cancel and terminate jobs and that plaintiff [petitioner], if it wishes to change the existing status quo, must proceed to exhaust its available remedies under the Railway Labor Act."

The Court of Appeals affirmed the judgment of the lower court on November 13, 1970. Appendix B, *infra*, page 21. The Court of Appeals ruled that "We think that an 'established practice' under the [Railway Labor] Act was intended to include only prior conduct of the parties which has attained the dignity of a relationship understood by the parties to at least impliedly serve as if part of the collective bargaining agreement." The Court of Appeals did not, however, rule or apparently consider the fact that the jobs which are the subject of this injunctive action were in existence and had not by previous established practice been abolished or jeopardized.

The Court of Appeals ruled further, Appendix B, page 21, that "an established practice" under the Railway Labor Act "• • • should demonstrate not only a pattern of conduct, but also some kind of mutual understanding, either expressed or implied. Thus, prior behavior by itself, although similar to acts and dispute, falls short of an 'established practice'." The Court of Appeals did not, however, consider the total absence of any mutual understanding as to the right to abolish or limit job assignments at Shanty #10, the subject of this litigation.

The Court of Appeals totally ignored the mandate of the *Shoreline* decision that the *status quo* was mandatory when a working condition not within the written confines of an agreement between a union and a carrier is sought by one or the other to be incorporated therein.

REASONS FOR GRANTING THE WRIT

The ruling of the Court of Appeals is in direct contradiction of this Court's ruling in *Detroit and Toledo Shoreline Railroad v. United Transportation Union*, 396 U.S. 142, (1969). The Court of Appeals, like the District Court, totally confused the concept of past practices with current existing working conditions.

While the Court of Appeals pointed out that the issue of the company's right to abolish work assignments unilaterally, and, implicitly, any limitations thereon, could be incorporated within the terms of the collective bargaining agreement, that Court expressly ignored this Court's statement in the *Shoreline* case that

> When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the act apply to that working condition if the purpose of the act is to be fulfilled. 90 S.Ct. 294, 302 (1969).

The Court of Appeals laid emphasis upon the fact that previous switchtender job assignments had been abolished without objection by the petitioner. However, the Court failed to distinguish between past practices and current working conditions and failed to hold that a job in existence at the time that a Section 6 notice is filed must be retained in accordance with the explicit language of the *Shoreline* opinion.

Petitioner concedes that the previous abolishment of job assignments was so long ago that objection at this time would not be consistent with the *Shoreline* case. However, the *Shoreline* case was designed to insure a retention of the *status quo* on existing conditions; whatever may be said about past practices, certain it is that past practices do not relate to current jobs which are subject to an effort by the

union, in this case the petitioner, to retain. There is no basis for inferring that the petitioner and employer agreed that the jobs subject to this litigation may be abolished at the pleasure of the company.

In *Shoreline*, *supra*, the carrier operated from Toledo, Ohio, to Detroit, Michigan. All crewmen reported for work at the Toledo yard and were transported for switching and other employment operations at various points to the north, toward Detroit. The carrier informed the union of its intent to establish outlying work assignments where the employees would report for work. The union then filed a notice under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to propose bargaining over the change of working conditions; and the carrier then announced that the new outlying assignments would be implemented. The notice of the union included negotiation on the carrier's making outlying assignments, and the carrier unilaterally proposed implementing the change in working conditions. The union threatened to strike. The carrier sued to enjoin the union from striking and the union counter-claimed for an injunction prohibiting the outlying assignments from being implemented in violation of the *status quo* provisions of Section 6 of the Railway Labor Act. That section, 45 U.S.C. Section 156, provides in relevant part that changes in agreements affecting rates of pay, rules, or working conditions must be preceded by a 30-day notice filed by the union or carrier requesting the change, with subsequent bargaining between the parties and thereafter action by the National Mediation Board. The statute states in particular as follows:

> • • • In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or

> working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by Section 155 of this Title, by the Mediation Board, unless a period of ten (10) days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. 45 U.S.C. § 156.

The lower courts in the present case held that the filing of the Section 6 notices to bargain on the abolishment of switch tenders' jobs did not preclude the respondent from abolishing those jobs because the respondent had in the past abolished certain jobs without objection by or consent of the union, this petitioner. *These* specific jobs were not contained within the written collective bargaining agreement but were in existence. Petitioner sought to negotiate about incorporating these jobs into a written collective bargaining agreement and sought to retain the *status quo* until the proceedings under the Railway Labor Act had been exhausted.

In the *Shoreline* case, the Supreme Court pointed out that it was not essential that the *status quo* be limited to those working conditions which are specifically incorporated in a written agreement. The Court said:

> We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly those conditions need not be covered in an existing agreement. 90 S.Ct. at 301.

The Supreme Court stated that the *status quo* was not limited to that which was in a written agreement. It stated: "When the union moves to bring such a previously uncovered condition within the agreement, it is absolutely essential that the status quo provisions of the act apply to that working condition if the purpose of the act is to be fulfilled." 90 S.Ct. at 302.

If there be any question as to whether the holding of the Supreme Court is that filing of a Section 6 notice is an automatic freeze of the *status quo* the dissent of Justice Harlan states as follows:

> I fully agree that the application of Section 6 should not be restricted to only those terms of employment that the parties have seen fit to embody in a written agreement. Section 6 may properly, in some circumstances, be extended to "freeze" *de facto* conditions of employment. I can not, however, accept what appears to be the majority's test for determining when a Section 6 freeze is appropriate. Any work practice is, in the words of the majority, an "actual objective working condition." 90 S.Ct. at 304.

It is obvious therefore that the dissent, as well as the majority opinion, clearly envisions the situation where when a job or working condition is attempted to be abolished, and the union files a Section 6 notice to negotiate about it, the carrier cannot thereafter abolish the job while it is subject to the Section 6 *status quo* provisions of the Railway Labor Act.

The *Shoreline* case is not a revolutionary holding. Other opinions have demonstrated the automatic *status quo* facet of a Section 6 notice. In *United Industrial Workers v. Board of Trustees*, 5th Cir., 351 F.2d 183 (1965), it was proposed that the carrier would lease out its facilities to another company and notified the union and employees that all employees would be permanently laid off on July 31, 1964. On July 29, 1964, the union served a Section 6 notice to negotiate all matter affecting wages, hours, and working conditions. On July 31, 1964, the union brought injunctive action under the Railway Labor Act to stop the consummation of the leasing of the facilities. The union prevailed, and the Court of Appeals said:

> The result ordinarily is that unless the proposed change is to be reflected in a change in the agreement, it is not a Section 6 situation and remains a minor dispute. But this is to be tested as a matter of substance since a carrier in imposing changes in novice contemplated or arguably covered by the agreement is not to escape the impact of the Act merely through device of unilateral action which it purposefully intends is not to become part of the written agreement. 351 F.2d at 188.

The Court stated further:

> We may assume that an employer has the legal right to go out of business. But under the Railway Labor Act, when he does so during the term of the agreement, it is such a change in working conditions that under Section 6 and Section 2 Seventh, he must give notice. By that simple language of Section 2 Seventh, the procedure of Section 6 was set in train. There is no pretense that Section 6 was complied with. Under these circumstances, the union, and perhaps the National sovereign, became entitled to effective judicial relief to assure fulfillment of this national labor policy. 351 F.2d at 190.

In *National Airlines, Inc. v. International Association of Machinists*, U.S.D.C. Florida, 303 F. Supp. 1132 (1969), the carrier proposed to make the crews for taxiing airplanes at the airport two men instead of three. A Section 6 notice was filed to negotiate this under the Railway Labor Act, and the District Court entered an order for the *status quo* by saying: "Once Section 6 notices have been exchanged, the status quo between company and union must be maintained."

In *Illinois Central Railroad Company v. BLE*, U.S.D.C., Illinois, 288 F. Supp. 504 (1968), the carrier proposed adding traveling engineers as management personnel to learn the operation of engines and the work of engineers in order that they may continue the trains in event of a strike by the engineers. The carrier there implemented its plan to utilize the management personnel and thereby made a change in

the working conditions and established practices in violation of Section 5 of the Railway Labor Act. The Court held that there could be no change under the guise of "management prerogative: of the written collective bargaining agreement except in compliance with the Section 6 provisions. This is followed in a further opinion, *Illinois Central Railroad Company v. BLE*, U.S.D.C., Illinois, 200 F. Supp. 1278 (1959).

The law is clear beyond peradventure that past practices do not foreclose a union from maintaining the *status quo* in respect to a proposed change in *existing* working conditions by the carrier when the union files a Section 6 notice to bargain on that very proposed change. Here respondent, notwithstanding the existence of a Section 6 notice to bargain on the very point, abolished the jobs and terminated that work. It was not a transfer of work to other personnel. The jobs indeed were abolished. This is in violation of the *status quo* provisions and clearly conflicts with the *Shoreline* holding of the Supreme Court.

CONCLUSION

Petitioner urges the Supreme Court to issue a Writ of Certiorari to the Court of Appeals for the Eighth Circuit in order that this Court may review and reverse the lower court's opinion, inasmuch as it clearly is in conflict with this Court's ruling in the *Shoreline* case, supra.

Respectfully submitted,

EUGENE A. RERAT
1160 First National Bank Bldg.
Minneapolis, Minnesota 55402
Phone: (612) 339-9231
Counsel for Petitioner

Of Counsel:
PATRICK J. FOLEY
1160 First National Bank Building
Minneapolis, Minnesota 55402
Phone: (612) 339-9231

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,285

United Transportation Union, Local Lodge No. 31,
Appellant,

vs.

St. Paul Union Depot Company,
Appellee.

Appeal from the United States District Court
For the District of Minnesota.

[November 13, 1970.]

Before GIBSON and LAY, Circuit Judges, and HUNTER, District Judge.

LAY, Circuit Judge.

This is an appeal filed by United Transportation Union, Local Lodge No. 31 (hereinafter U.T.U.) from the district court's denial of injunctive relief sought to prohibit the St. Paul Union Depot Company from abolishing certain job assignments during the pendency of a notice served under the Railway Labor Act (45 U.S.C.A. § 151 et seq.) to negotiate the disagreement. The Depot Co. owns and operates

railroad yard and terminal facilities at St. Paul, Minnesota. On January 9, 1970, the U.T.U. served on the company a notice under § 6 of the Act to negotiate:

> "[O]ur desire to change, modify or supplement existing agreement or agreements, to become effective 30 days from the date of this notice, to provide that the St. Paul Union Depot Company will not abolish, annul or cancel any assignments or jobs without negotiation or agreement with the General Committee of Adjustment, United Transportation Union." [1]

The parties thereafter conferred without reaching agreement. On March 30, 1970, the U.T.U. requested the services of the National Mediation Board under the Railway Labor Act. On April 9, 1970, the company announced that three switchtender assignments at Shanty No. 10 would be abolished the following day. The union immediately sought injunctive relief on the ground that the company had failed to maintain the status quo while the dispute was under the jurisdiction of the Mediation Board. The district court denied relief on the ground that the parties had observed in the past an established practice which allowed the company to unilaterally abolish work assignments. The district court considered this practice to be part of the status quo. We affirm.

The Supreme Court discussed the status quo provisions of the Railway Labor Act in *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 150-51 (1969):

> "There are three status quo provisions in the Act, each covering a different stage of the major dispute

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[1] On January 19, 1970, the company in turn served a notice to negotiate on:

> "[A]ll agreements, rules, regulations, interpretations and practices which limit the right of the carrier to establish and abolish yard service and yard service assignments shall be eliminated."

This notice is still pending.

> settlement procedures. . Section 6, the section of immediate concern in this case, provides that 'rates of pay, rules, or working conditions shall not be altered' during the period from the first notice of a proposed change in agreements up to and through any proceedings before the National Mediation Board. Section 5 *First* provides that for 30 days following the closing of Mediation Board proceedings 'no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose,' unless the parties agree to arbitration or a Presidential Emergency Board is created during the 30 days. Finally, § 10 provides that after the creation of an Emergency Board and for 30 days after the Board has made its report to the President, 'no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.' These provisions must be read in conjunction with the implicit status quo requirement in the obligation imposed upon both parties by § 2 First, 'to exert every reasonable effort' to settle disputes without interruption to interstate commerce."

The Court observed that although §§ 5, 6 and 10 are not identical, the sections nevertheless are to be construed together with § 2 First as providing an "integrated, harmonious scheme . . . [and] . . . the intent and effect of each is identical so far as defining and preserving the status quo. . . ." *Id.* at 152.[2]

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[2] Mr. Justice Black in discussing the "status quo" requirement commented:

> "The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides times for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party

In the instant case, the company asserts that there was an "established practice" arising from conduct over a period of eight years whereby job assignments had been unilaterally discontinued without U.T.U. objection. It contends that this practice was part of the status quo frozen upon service of the § 6 notice. The union contends that the practice was not a "working condition" and therefore was not part of the status quo. The union asserts that only the job assignments themselves were part of the status quo and unilaterally abolishing them is in clear violation of the Railway Labor Act. In the *Shore Line* case the Supreme Court stated the railroad would not be barred from ordering job assignments if they "had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Id.* at 154. The U.T.U. contends this refers only to the making of the actual assignments in dispute rather than reference to an over-all practice or right to make the assignments.

We would agree that the prior occurrences of similar conduct should not be considered a *per se* "practice" or "working condition" under the Railway Labor Act. We think that an "established practice" under the Act was intended to include only prior conduct of the parties which has attained the dignity of a relationship understood by the parties to at least impliedly serve as if part of the collective bargaining agreement. Although not dealing with the Railway Labor Act, the Supreme Court in discussing "practices" of an industry under collective bargaining agreements observed in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960):

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to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce." Id. at 150.

> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." 363 U.S. at 581-82.

An "established practice" under the Act should demonstrate not only a pattern of conduct but also some kind of mutual understanding, either expressed or implied. Thus, prior behavior by itself, although similar to the acts in dispute, falls short of an "established practice." Whether prior conduct establishes a working practice under the Act depends upon consideration of the facts and circumstances of the particular case. Among the factors one might reasonably consider would be the mutual intent of the parties, their knowledge of and acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute. Compare *Pekar v. Local 181, Brewery Workers*, 311 F.2d 628 (6 Cir. 1962), cert. denied 373 U.S. 912 (1963); *Independent Petroleum Workers v. Standard Oil Co.*, 275 F.2d 706 (7 Cir. 1960); *Independent Oil Workers Union, Local 117, v. American Oil Co.*, 296 F.Supp. 650, 658 (D. Kansas 1969); *Guenther v. Morehead*, 272 F.Supp. 721, 726-28 (S.D. Iowa 1967); *McClure v. E. A. Blackshere Co.*, 231 F.Supp. 678, 682 (D. Md. 1964); *Whitam v. Chicago, R. I. & P. Ry.*, 66 F.Supp. 1014, 1017 (N.D. Texas 1946). See also Treece, *Past Practice and Its Relationship to Specific Contract Language in the Arbitration of Grievance Disputes*, 40 Colo. L. Rev. 358 (1968).

In the present case the district court was not faced with the necessity of an evidentiary hearing to determine if the prior unilateral abolishments constituted an accepted prac-

tice within the Act.[3] The U.T.U. stipulated at the hearing before the district court:

> "That there has been, over a long period of time, an established practice on the defendant's property under which job assignments have been discontinued and that such practice was known to and acquiesced in and not objected to by the employees or their organization."

We think this stipulation forecloses consideration of the issue raised by the union on appeal.

The union additionally contends that the company may establish a practice to make work assignments but not the right to abolish assignments. We fail to see the distinction. The terms "working condition" and "practice" under the Act are to be broadly interpreted. 396 U.S. at 153. See also *Manning v. American Airlines, Inc.*, 329 F.2d 32, 35 (2 Cir. 1964), and *National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers*, 303 F.Supp. 1132, 1133 (S.D. Fla. 1969). It cannot be doubted that the company could be given the express right to unilaterally abolish work assignments within the terms of the collective bargaining agreement. If this right existed as part of the agreement, upon a § 6 notice to change the agreement, it would unquestionably be part of the status quo. Any attempted change of the right through negotiation would be subject to the status quo provisions of the Act until actually changed. The fact that the right is established as an accepted "practice," rather

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[3]It was undisputed that the company had previously discontinued the following switchtender assignments:

1. July 1, 1962, Shanty 4 (3:00 p.m. to 11:00 p.m.)
2. May 1, 1964, Shanty 5 (11:59 p.m. to 7:59 a.m.)
3. August 29, 1967, Shanty 8 (6:30 a.m. to 2:30 p.m.; 3:59 p.m. to 11:59 p.m.; 11:59 p.m. to 7:59 a.m.)
4. April 25, 1969, Shanty 6 (7:00 p.m. to 3:00 p.m.)
5. April 30, 1969, Shanty 2 (4:00 p.m. to 12 midnight)

than by express agreement, cannot change what is to be frozen as part of the status quo. 396 U.S. at 152-55.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action File No. 3-70-90

United Transportation Union,
Local Lodge #31,

Plaintiff,

vs.

St. Paul Union Depot Company, a corporation,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR SUMMARY JUDGMENT

The above entitled cause came on to be heard before the Court on April 16, 1970, on a temporary restraining order and order to show cause, issued on behalf of plaintiff against defendant by the Honorable Miles W. Lord, United States

District Judge, on April 10, 1970, said order to show cause being returnable, pursuant to the terms of the original order, at 9:00 A.M., April 20, 1970; and, said hearing on April 16, 1970, being by stipulation of the parties.

In addition to the above entitled cause, as part of these proceedings, there was heard a motion by defendant for a summary judgment.

Plaintiff was represented by Mr. Patrick J. Foley, Attorney of Minneapolis, Minnesota. Defendant was represented by Mr. Gordon Forbes, Attorney of St. Paul, Minnesota.

Stipulations were taken; and, on the pleadings, affidavits, motions and arguments of Counsel, and the Court being fully advised in the premises, it hereby makes and enters the following:

Findings of Fact

1. Plaintiff, United Transportation Union, Local Lodge #31, is a labor organization within the meaning of the Railway Labor Act, with its principal business and office at the residence of Ronald P. Lein, General Chairman of Adjustment, United Transportation Union, Local Lodge #31, at 4201 Ewing Avenue South, Minneapolis, Minnesota.

2. Defendant is a corporation organized and existing under the laws of the State of Minnesota, with general offices at St. Paul, Minnesota, and is a rail common carrier engaged in interstate commerce and is a carrier within the meaning of the Railway Labor Act.

3. Defendant owns and operates railroad facilities and switching tracks located in the City of St. Paul, County of Ramsey, State of Minnesota. Defendant's system is an integral part of a nationwide railroad system. Defendant owns and operates the only railroad passenger terminal in the City of St. Paul, Minnesota, a metropolitan city with approxi-

mately 350,000 people; and, defendant maintains and operates a large railroad mail facility and handles approximately 10,000 passengers in and out of its facilities each month. Defendant employs approximately 600 employees and moves in and out of its facilities approximately 61,400 sacks or bags of mail, 40 passenger trains and 23 freight trains daily. The transportation service defendant thus provides in this manner and with the described facilities constitutes transportation service essential to the region involved.

4. The controversy which gives rise to this action results from defendant's making certain changes in the physical property of the Saint Paul Union Depot Company wherein certain track, amounting to about 1,600 feet in total length, no longer needed in the operation of the Saint Paul Union Depot Company, was eliminated; and, as a result of the removal of the track, certain switches were no longer needed and have, in fact, already been removed. As a result of this change in business activity on the property of defendant, and, because there was no work to be done tending the switches which had been removed, defendant served notice on certain employees to abolish three (3) switchtender assignments at Shanty 10 in defendant's yard in St. Paul, Minnesota, and such notice was served prior to the commencement of this action.

5. That the plaintiff on January 9, 1970, served on the authorized agent of the defendant a notice, pursuant to Section 6 of the Railway Labor Act, providing for negotiation on "our desire to change, modify or supplement existing agreement or agreements, to become effective 30 days from the date of this notice, to provide that the Saint Paul Union Depot Company will not abolish, annul or cancel any assignments or jobs without negotiation or agreement with the General Committee of Adjustment, United Transportation

Union". That a terminating conference was held on January 19, 1970, and no agreement was reached on this subject matter. That, following said terminating conference, plaintiff did not request the services of the Mediation Board until March 30, 1970, more than 10 days after the terminating conference as required by 45 U.S.C. 156.

6. Defendant's representatives on January 19, 1970, pursuant to Section 6 of the Railway Labor Act, served a notice on plaintiff for negotiation on the subject of "all agreements, rules, regulations, interpretations and practices which limit the right of the carrier to establish and abolish yard service and yard service assignments shall be eliminated". That conference on defendant's notice was held on February 16, 1970, and no agreement reached and that this Section 6 notice is still pending.

7. That defendant on April 9, 1970, issued a bulletin providing as follows:

> "Effective with the completion of their respective tours of duty, Friday, April 10, 1970, the switchtenders' assignments at Shanty #10, hours indicated below are abolished.
>
> Switchtender's assignment at Shanty #10, hours 7:00 a.m. to 3:00 o'clock p.m.
>
> Switchtender's assignment at Shanty #10, hours 3:00 p.m. to 11:00 o'clock p.m.
>
> Switchtender's assignment at Shanty #10, hours 11:00 p.m. to 7:00 a.m."

8. That, over a period of approximately the last eight years preceding the bringing of this action, defendant has made the following discontinuances of assignments or jobs:

April 20, 1969, discontinued 4:00 P.M. to 12 Midnight Shanty 2 switchtenders (sic) assignment;

April 25, 1969, discontinued 7:00 P.M. to 3:00 P.M. Shanty 6 switchtender assignment;

August 29, 1967, discontinued 6:30 A.M. to 2:30 P.M., 3:30 P.M. to 11:30 P.M. and 11:30 P.M. to 7:30 A.M. Shanty 8 switchtender assignments;

May 1, 1964, discontinued 11:30 P.M. to 7:30 A.M. Shanty 5 switchtender assignment;

July 1, 1962, discontinued 3:00 P.M. to 11:00 P.M. Shanty 4 switchtender assignment.

9. That it was stipulated by plaintiff and defendant in the record at this hearing that:

a. The three switchtender jobs in question were in existence at the time of the commencement of this action and at the time of service of both Section 6 notices aforesaid.

b. That there has been, over a long period of time, an established practice on the defendant's property under which job assignments have been discontinued and that such practice was known to and acquiesced in and not objected to by the employees or their organization.

c. That there is not now, nor has there been in the past, a practice, understanding or a written collective agreement between the defendant and the plaintiff requiring negotiation, consent or agreement with the plaintiff to abolish, annul or cancel established jobs.

10. That, on the motion of the plaintiff, Judge Miles W. Lord issued a temporary restraining order and directed the defendant herein to show cause before this Court why plaintiff's motion for a preliminary injunction should not be granted, said restraining order being issued on April 10, 1970, returnable April 20, 1970, and being heard on April 16, 1970, by agreement of the parties.

11. That plaintiff stipulated it would waive any question of timeliness of notice on the notice of the pending motion for summary judgment, and that there was no fact issue for decision.

Conclusions of Law

1. That the Court has jurisdiction of the action and of the parties thereto.

2. That, at the time of commencement of plaintiff's action and for a period of years preceding the commencement of said action, defendant had the unimpaired right, which it had, in fact, exercised, to abolish, annul or cancel established job assignments.

3. That, under the provisions of Section 6 of the Railway Labor Act, 45 *U.S.C.* 151, *et seq.*, both parties, during the period in which the Railway Labor Act is invoked, shall equally maintain the status quo; that duty being to preserve and maintain unchanged those actual, objective working conditions and practices broadly conceived which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

4. That, for a period of approximately eight years immediately preceding the bringing of this action and the service of any Section 6 notices on this subject matter, plaintiff has had knowledge of and acquiesced in and not objected to nor attempted to limit defendant's right to discontinue yard assignments or switchtender jobs; and, therefore, the status quo required under the Railway Labor Act at the time of the serving of the Section 6 notices aforesaid is that defendant did have under existing practices the right to abolish, annul or cancel established job assignments.

5. That defendant has an existing, status quo right to cancel and terminate jobs and that plaintiff, if it wishes to change the existing status quo, must proceed to exhaust its available remedies under the Railway Labor Act.

It Is, Therefore, Ordered that the temporary restraining order issued April 10, 1970, is hereby vacated and dissolved.

It Is Further Ordered that plaintiff's motion for a preliminary injunction or permanent injunction is denied.

It Is Further Ordered, Adjudged and Decreed that defendant's motion for summary judgment be and same hereby is granted; that the plaintiff has and recover nothing by its suit; and, that defendant recover its costs to be taxed.

Dated this 17th day of April, 1970.

By the Court:

Edward J. Devitt
Judge of District Court

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 18 1971
AVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1174

UNITED TRANSPORTATION UNION,
LOCAL LODGE NO. 31,

Petitioner,

v.

ST. PAUL UNION DEPOT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

FRANCIS M. SHEA
RALPH J. MOORE, JR.
734 Fifteenth Street, N.W.
Washington, D. C. 20005
GORDON FORBES
207 Union Depot Building
St. Paul, Minnesota
Attorneys for Respondent

Of Counsel:
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970
No. 1174

UNITED TRANSPORTATION UNION,
LOCAL LODGE NO. 81,

Petitioner,

v.

ST. PAUL UNION DEPOT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, not yet officially reported, is unofficially reported at 75 LRRM 2595 and 64 CCH Lab. Cas. ¶ 11,272 and appears in Appendix A to the petition for certiorari. The findings of fact, conclusions of law, and judgment of the district court are unofficially reported at 74 LRRM 2161 and 62 CCH Lab. Cas. ¶ 10,830 and appear in Appendix B to the petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1970. The petition invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a railroad may discontinue job assignments pursuant to an established practice in which its employees and their union have previously acquiesced during the pendency of a union proposal to change or abolish the practice.

STATUTES INVOLVED

The statutes involved are the "*status quo*" provisions of the Railway Labor Act—

Section 5 (45 U.S.C. § 155) in relevant part:

> "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, *no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.*" (Emphasis added.)

Section 6 (45 U.S.C. § 156):

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the begin-

ning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, *rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon* as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." (Emphasis added.)

Section 10 (45 U.S.C. § 160) in relevant part:

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. . . .

"After the creation of such board and for thirty days after such board has made its report to the President, *no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.*" (Emphasis added.)

STATEMENT

This case involves the question whether a railroad union can compel a railroad to discontinue a long-established practice in which the union has acquiesced, simply by serving a notice *proposing* the abolition of the practice. In the courts below, petitioner union sought an injunction to prohibit the St. Paul Union Depot Company from abolishing certain assignments pursuant to long-established practice during the pendency of a proposal by the union to abolish the practice. The courts below denied the injunction. The relevant facts are as follows:

Respondent St. Paul Union Depot Company ("Depot") conducts switching and terminal operations in St. Paul, Minnesota (Pet. 22-23). Petitioner United Transportation Union ("UTU") represents switchtenders at the Depot (Pet. 22). The parties stipulated and the District Court found that "there has been, over a long period of time, an established practice on the [Depot's] property under which job assignments have been discontinued," and there has never been "a practice, understanding or a written collective agreement . . . requiring negotiations, consent or agreement with the [UTU] to abolish, annul, or cancel established jobs." The established "practice was known to and acquiesced in and not objected to by the employees or their organization." (Pet. 25.) In recent years, the Depot has discontinued switchtender assignments at Shanties 2, 4, 5, 6 and 8 pursuant to the established practice (Pet. 24-25).

Desiring to change the *status quo* in this respect, the UTU served the Depot with a notice under Section 6 of the Railway Labor Act (45 U.S.C. § 156) on January 9, 1970, requesting the Depot to agree that it would "not abolish, annul or cancel

any assignments or jobs without negotiation or agreement" with the UTU (Pet. 23-24). On January 19, 1970, in accordance with Section 6, representatives of the Depot and the UTU conferred with respect to the UTU notice, but no agreement was reached. That same day, the Depot served the UTU with a counternotice requesting the elimination of all "agreements, rules, regulations, interpretations and practices which limit the right of the carrier to establish and abolish yard service and yard service assignments." On February 16, 1970, the parties conferred with respect to the Depot's notice, but again no agreement was reached. On March 30, 1970, the UTU invoked the mediatory services of the National Mediation Board with respect to the UTU notice. (Pet. 24.)

In the meantime, as a result of a change in business activity at the Depot, the need for a section of track 1600 feet in length was eliminated and the track was removed. As a result, certain switches were no longer needed and likewise were removed. Those switches had been tended at Shanty 10 by one switchtender during each of the three shifts each day. Because there was no longer any work to be done tending the switches, the Depot, on April 9, 1970, announced that the switchtenders' assignments at Shanty 10 would be discontinued the following day. (Pet. 23, 24.)

Elimination of the assignments was temporarily restrained when the UTU filed the complaint in this case. One week later, however, Chief Judge Devitt vacated the restraining order, denied the UTU's motion for preliminary and permanent injunctive relief, and granted the Depot's motion for summary judgment (Pet. 26-27).

In granting judgment for the Depot, the district court concluded that under the Railway Labor Act *both* parties must abide by the *status quo* during the pendency of a proposal to

change it; that at the time the UTU served its notice established practices in which the union had acquiesced permitted the Depot to discontinue switchtender assignments without restriction; and that if the UTU wished to change the *status quo* in that respect it was obliged first to exhaust the procedural requirements of the Railway Labor Act (Pet. 26).

On appeal, the Eighth Circuit affirmed. In an opinion by Judge Lay, the court held that "established practices" are part of the *status quo* that is "frozen"—that both parties must accept—during the pendency of a "major" dispute over proposals to change the *status quo*, and thus that the UTU could not compel the Depot to discontinue its established practices with respect to the termination of unneeded assignments simply by serving a proposal to abolish the practices in question. By "established practice" the court meant conduct in circumstances evidencing "some kind of mutual understanding, either express or implied" (Pet. 19), stating that:

> "We would agree that the prior occurrences of similar conduct should not be considered a *per se* 'practice' or 'working condition' under the Railway Labor Act. We think that an 'established practice' under the Act was intended to include only prior conduct of the parties which has attained the dignity of a relationship understood by the parties to at least impliedly serve as if part of the collective bargaining agreement." (Pet. 18.)

In support of its conclusions, the court relied on the statutory *status quo* provisions, which refer explicitly to "established practices" and "conditions" (Pet. 16-17). In addition, the court stated that "[i]t cannot be doubted" that if the parties' collective bargaining agreement had expressly given the Depot the right to abolish assignments unilaterally, that right would continue to exist, after the service of a Section 6 notice to

change the agreement, until the agreement was changed; and concluded that "[t]he fact that the right is established as an accepted 'practice,' rather than by express agreement," does not alter the situation (Pet. 20-21). These conclusions were supported by numerous decisions (Pet. 16-21), including *Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969). In that case this Court held that a railroad had violated the statutory *status quo* requirement by changing its previous practice of having all employees report to work at Toledo, during the pendency of a union Section 6 notice proposing an agreement that would have required continuation of that practice, but the Court made it clear that the railroad's action would not have violated the Act if assignments at reporting points away from Toledo "had occurred" prior to service of the Section 6 notice "for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." 396 U.S., at 154 (emphasis added). (Pet. 18.)

ARGUMENT

There is no occasion for further review. The UTU's only reason for claiming that this Court should hear the case is that the decision below allegedly conflicts with *Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969). In that connection, the UTU charges that the court below "expressly ignored" the *Shore Line* decision (Pet. 8). In fact, however, the court below relied upon *Shore Line*, rather than ignoring it. Far from conflicting with *Shore Line*, either in holding or in principle, the decision below is supported by it. The legal premises upon which the decision below was based are clearly correct. There is no conflict among the circuits. That leaves for consideration only petitioner's contentions as to the par-

ticular facts of this case, a matter not appropriate for review by this Court and as to which there was no error below.[1]

1. There is no conflict between the decision below and this Court's decision in *Shore Line*. In *Shore Line*, this Court held that a railroad had violated the *status quo* provisions of the Railway Labor Act by *departing* from its previous practice of having employees report to work at Toledo during the pendency of a union Section 6 notice proposing *continuation* of that practice. The court below held that a railroad did not violate the Act by *refusing* to discontinue its established practice of terminating unneeded assignments without first consulting the union during the pendency of a union notice proposing to *change* that practice. Obviously, there is no conflict between the holding in *Shore Line* and the holding below.

Nor is there any conflict in principle—any conflict in the legal premises upon which the two decisions are based. Both are founded upon the premise that during the pendency of a "major" dispute over changes in the *status quo* desired by one party or the other, the Railway Labor Act requires *both* parties to abide by the existing *status quo*. That is, if a railroad or a union desires to change an existing condition—the practice of having all employees report to work in Toledo *(Shore Line)* or the practice of discontinuing unneeded assignments

[1] At the outset, we note that in its statement of the questions presented (Pet. 3-4) petitioner asserts that the question is whether the railroad was "subject to" the *status quo* requirements of the Railway Labor Act following service of parties' Section 6 notices. That question is *not* presented, however, for the Depot agrees that both parties were subject to the statutory *status quo* requirements following service of the notices, and the court below decided the case upon that basis (Pet. 18). The question decided below—and therefore the only question that could properly be presented here—is the question stated at the beginning of this brief in opposition—in substance, whether the *status quo* provisions of the Act required the Depot to *discontinue* the established practice regarding the elimination of unneeded job assignments, following service of the parties' Section 6 notices.

without negotiation (this case)—the party desiring the change must abide by the *status quo* until major dispute procedures are concluded. That obligation is phrased in various ways in the statutory provisions applicable during the successive steps in the major dispute procedures—as an obligation not to "change" "*established practices* in effect prior to the time the dispute arose" (§ 5, emphasis added), or to "alter" "rates of pay, rules, or working conditions" (§ 6), or to "change" the "conditions out of which the dispute arose" (§ 10). But "the intent and effect of each" of these provisions "is identical so far as defining and preserving the *status quo* is concerned." 396 U.S., at 152. "The obligation of *both* parties during a period in which any of these *status quo* provisions is properly invoked is to preserve and maintain unchanged those actual, objective working conditions *and practices*, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute." 396 U.S., at 152-153 (emphasis added).

Therefore, when a railroad desires to change a previous practice that affects its employees and a union objects—the situation in *Shore Line*—the railroad cannot compel the union to accept the proposed change pending exhaustion of major dispute procedures. And when the shoe is on the other foot, as it is in this case—when it is the union that seeks a change in an established practice that previously was "satisfactorily tolerable to both sides" (396 U.S., at 155)—the union cannot compel the railroad to accept the proposed change pending exhaustion of major dispute procedures. Far from conflicting, the premises upon which *Shore Line* and the decision below are based are the same.

The legal premises of the decision below are clearly correct, for the statutory *status quo* requirement is a shield to preserve

the *status quo* pending negotiations, not a sword with which to destroy it in advance of negotiations. Thus, the statutory *status quo* provisions expressly freeze "established practices" and "the conditions out of which the dispute arose" (in this case, the railroad's established practice regarding the discontinuance of assignments). Consistently with the statutory language, the court below held that pending negotiations over proposed changes in the *status quo* a railroad may continue to follow established practices that "at least impliedly serve as if part of the collective bargaining agreement" (Pet. 18)—practices evidencing "some kind of mutual understanding, either express or implied" (Pet. 19). That view of the matter is identical to this Court's in *Shore Line*, where the Court held that the *status quo* requirement prohibited the Shore Line from establishing certain assignments away from Toledo but stated that such assignments would not have been barred "*if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions.*" 396 U.S., at 154. To hold otherwise would mean that conditions that previously were "satisfactorily tolerable to both sides" (396 U.S., at 155) could be changed, and indeed that previously agreed-upon rights could be obliterated, by the mere service of a Section 6 notice proposing that result. In terms of the situation in *Shore Line*, it would mean that if the previous practice was not to make outlying assignments, the railroad could not change that practice over union objection until it had exhausted the "long and drawn out," "almost interminable" (396 U.S., at 149) procedures prescribed by the major dispute provisions of the Railway Labor Act; but if the practice had been to make such assignments, the union could compel the railroad to discon-

tinue the practice immediately, simply by serving a Section 6 notice proposing such a change. The Railway Labor Act is not such a one-way street. As this Court stated in *Shore Line*, "[t]he obligation of *both* parties . . . is to preserve and maintain" the *status quo;* "[o]nly if *both* sides are equally restrained can the Act's remedies work effectively." 396 U.S., at 152-153, 155 (emphasis added).

2. Nor is there any conflict among the circuits. Indeed, petitioner does not claim otherwise. Petitioner does refer to three lower court decisions that allegedly support its position (Pet. 11-13), but those decisions are not in point. In each, the carrier had *changed* or was about to change practices followed in the past and did not claim that its actions were in accordance with past practice. Therefore, each case was like *Shore Line* and unlike this case. Thus, in *United Industrial Workers* v. *Board of Trustees*, 351 F. 2d 183 (5th Cir., 1965), the question was whether a carrier could lease its facilities to another company and discharge all its employees in the face of a demand that it bargain with respect to such action. Prior to the demand, the carrier itself had operated the facilities in question "for many years." 351 F. 2d, at 184. Similarly, in *National Airlines, Inc.* v. *International Ass'n of Machinists*, 303 F. Supp. 1132 (S.D. Fla., 1969), the carrier reduced airplane "taxi" crews from three men to two in the face of a notice proposing an agreement to continue the use of three-man crews, and no claim was made that the carrier had ever before used a two-man crew. And in *Illinois Central R. Co.* v. *Brotherhood of Locomotive Eng.*, 288 F. Supp. 504 (N.D. Ill., 1968), 299 F. Supp. 1278 (N.D. Ill., 1969), *aff'd*, 422 F. 2d 593 (7th Cir., 1970), the carrier required engineers to relinquish the controls of their locomotive in circumstances in which that had never been done before. 299 F. Supp., at 1280. In short, in each of

these cases the union claimed that the carrier had altered the *status quo* by doing something it had not done before. In the present case, in sharp contrast, the UTU claims in effect that the carrier has violated the *status quo* requirements of the Railway Labor Act by *not* discontinuing previous practices. The cases the UTU cites afford no support for such a claim.

3. That leaves for consideration only the application of clear legal principles to the particular facts of this case. In that regard, the UTU suggests in its "Concise Statement of the Case" (Pet. 7), and again at one point in its discussion of reasons for granting the writ (Pet. 9), that the established practice with respect to the discontinuance of unneeded switchtender assignments applied only to assignments that had already been discontinued when it served its Section 6 notice and not to other assignments. But error as to that would involve no issue of general importance and therefore would not constitute a ground for review by this Court; and in any event there was no error. In the district court, the union stipulated that "there has been, over a long period of time, an established practice . . . under which *job assignments* have been discontinued" (emphasis added); that the practice did not require "negotiation, consent or agreement" with the UTU before unneeded assignments were discontinued; and that the practice was "known to" the employees and their union, who did not "object" but instead "acquiesced" in it. (Finding No. 9, Pet. 25.) In addition, the UTU conceded and the district court found that the Depot had discontinued switchtender assignments at Shanties 2, 4, 5, 6 and 8 pursuant to the established practice before the union first decided to seek a change in that practice. (Finding No. 8, Pet. 24-25.) Therefore, the courts below simply took the UTU at its word in deciding the case as they did. It would have been preposterous to conclude

on this record, as the UTU would have the courts conclude, that there was an established practice permitting discontinuance of switchtender assignments at Shanties 2, 4, 5, 6 and 8 but not at Shanty 10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS M. SHEA
RALPH J. MOORE, JR.
734 Fifteenth Street, N.W.
Washington, D. C. 20005
GORDON FORBES
207 Union Depot Building
St. Paul, Minnesota
Attorneys for Respondent

Of Counsel:
SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005